Nos. 06-82, 06-84, 06-100, 06-101

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IN THE

Supreme Court of the United States

HARTFORD FIRE INSURANCE COMPANY,
Petitioner,

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,
Petitioners,

GEICO GENERAL INSURANCE COMPANY, *et al.*,
Petitioners,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

JASON JAY REYNOLDS,
Respondent,

CHARLES BURR, *et al.*,
Respondents,

AJENE EDO,
Respondent,

JULIE WILLES,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Property Casualty Insurers Association of America ("PCI") respectfully submits this *amicus curiae* brief in support of the petitions for writs of certiorari to the United States Court of Appeals for the Ninth Circuit filed by Hartford Fire Insurance Company; GEICO General Insurance Company, GEICO Indemnity Company, and Government Employees Insurance Company; Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon; and State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company (collectively "petitioners").[1]

INTEREST OF *AMICUS CURIAE*

PCI is a trade group dedicated to representing its member companies' interests before governmental bodies and state and federal courts. PCI's members include more than 1,000 property and casualty insurance companies that together account for $184 billion in direct written premiums, including 52% of all personal auto premiums and 39.6% of all homeowners premiums written in the United States.

PCI is familiar with the issues involved in this case, including the issues raised in petitioners' petitions for writs of certiorari. As those petitions demonstrate, this case presents several issues of first impression relating to the interpretation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq.*, each of which is of critical importance to PCI's members and to the insurance industry as a whole. PCI and its member companies thus have a substantial interest in the outcome of the present action.

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1. No counsel for any party authored this *amicus* brief in whole or in part, and no person or entity other than PCI made a monetary contribution to the preparation or submission of the brief. All parties have consented to the filing of this *amicus* brief, and their letters are on file with the Clerk of this Court.

In PCI's view, one aspect of the Ninth Circuit's opinion in particular bears further briefing: the required contents of a valid adverse action notice under 15 U.S.C. § 1681m. PCI believes its *amicus* brief will be helpful to the Court in offering a somewhat different approach to this issue than do the parties' petitions and in providing data that underscore the significant negative consequences to the insurance industry and the insurance-buying public if the Ninth Circuit's opinion is allowed to stand.

SUMMARY OF ARGUMENT

The Ninth Circuit's opinion fashions entirely new content requirements for adverse action notices that threaten the very solvency of the insurance industry. These unprecedented requirements are unsupported by any authority and conflict with both the express language of 15 U.S.C. § 1681m ("section 1681m") and with Federal Trade Commission directives written for the express purpose of advising insurers of their obligations under FCRA. These new notice requirements are vague in their scope and application and, given the realities of modern insurance underwriting practices, may be virtually impossible for insurers to meet.

The detailed notice requirements adopted by the Ninth Circuit will also thwart one of Congress's primary objectives in enacting FCRA, which is to provide consumers with clear, intelligible information concerning their credit reports. Combined with the court's expansive definition of "willfulness," imposition of these requirements threatens the insurance industry with potentially ruinous penalties and the prospect of continued litigation. For all these reasons, petitioners' requested writs of certiorari should issue.

ARGUMENT

A. The Decision Below Seriously Threatens the Continued Availability and Affordability of Personal Lines Insurance.

According to the Ninth Circuit's opinion, in order to comply with section 1681m, an adverse action notice must, "at a minimum, . . . communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action." *Reynolds v. Harford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1095 (9th Cir. 2006); *see id.* at 1100. As will be discussed further below, these hitherto unknown requirements conflict with the express language of the statute, run afoul of the dictates of prior case law, and are patently inconsistent with Federal Trade Commission advisory directives written specifically to inform insurers of their obligations under FCRA. If upheld, these requirements could have a potentially devastating impact on the insurance industry, since insurers have for years sent out notices that could be construed to fall short of the Ninth Circuit's newly-minted requirements. In light of the broad standard of "willfulness" adopted by the court (discussed further below), such a construction could subject many insurers to statutory liabilities of staggering proportions.

According to industry data, it is estimated that, in 2005, the number of personal lines policies subject to credit scoring (including both new business and renewals) exceeded 71.5 million.[2] While there are no data stating how many adverse

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2. This figure was derived using public information, beginning with the latest personal auto and homeowners exposure counts from the National Association of Insurance Commissioners for those states

(Cont'd)

action notices insurers sent during this same time period, it may conservatively be assumed that approximately 50% of these policies triggered such notices.[3] Based on these assumptions, insurers sent some 35.7 million adverse action

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(Cont'd)

where credit information is allowed. Because each insured automobile constitutes an "exposure," even though more than one auto may be insured on a single policy, the total number of "exposures" was extrapolated and converted into policy counts using data from the Federal Highway Administration and the U.S. Census Bureau. The total policy counts (176.4 million) were then reduced to include only those policies for which credit history was examined. The factors used to generate the final numbers and their sources are as follows:

- Proportion of companies known to use insurance scoring - Michigan Office of Financial and Insurance Services;
- Percentage of the largest auto companies using credit scoring models - Conning & Company;
- Percentage of companies using credit data on new business - Conning & Company;
- Retention ratios (applied to develop breakdown between new business and policy renewals) - Ward Financial Group; and
- Frequency with which renewal policy counts are subject to credit (three years) - National Conference of Insurance Legislators' Model Act Regarding Use of Credit Information in Personal Insurance

These percentages and ratios were then applied to the total policy counts to determine the estimated new and renewal policies affected by the use of credit-based insurance scoring.

3. These percentages obscure the fact that, generally speaking, the use of credit information and other consumer reports enables carriers to charge *lower* rates overall than would otherwise be the case. Thus, a carrier's actions in an individual case might trigger an adverse action notice (e.g., where the applicant's credit standing results in an "increased" premium), even though the applicant is paying less than if the carrier had calculated the premium using a different set of factors that did not include credit information.

notices in 2005 alone, *not* including those sent when an application is denied. Assuming, as it is reasonable to do, that similar numbers of adverse action notices were sent in each of the past five years, carriers have sent approximately 178.5 million adverse action notices since 2001 – many of which could conceivably be vulnerable to *ex post facto* scrutiny based on the Ninth Circuit's new notice requirements.

FCRA provides for statutory damages of between $100 and $1000 per willful violation. 15 U.S.C. § 1681n(a). The Ninth Circuit's overreaching interpretation of FCRA's notice requirements thus potentially exposes the insurance industry to statutory damages alone (not including punitive damages) that could threaten the solvency of many insurers and negatively affect the continued availability and affordability of personal lines insurance. Even without more, but especially in light of these potentially devastating consequences, the Ninth Circuit's erroneous and unsupported interpretation of FCRA's notice requirements warrants this Court's plenary review.

B. The "Minimum Requirements" for a Valid Adverse Action Notice Announced by the Ninth Circuit Are Not Supported by the Statutory Language and Are Inconsistent with the Governing Agency's Interpretation of the Statute.

1. The Ninth Circuit's Interpretation of Section 1681m Conflicts with the Statutory Language and Has No Support in the Case Law.

The purposes of FCRA, and of its notice requirement, are twofold: "to safeguard against the improper reporting of information on a credit report (either by the credit reporting agency or by the furnisher of credit information)" and to guard against "the improper disclosure of a credit report."

Myers v. Bennett Law Offices, 238 F.3d 1068, 1074 (9th Cir. 2001); *see* 15 U.S.C. § 1681(b) (noting that one of FCRA's purposes is to "require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information").

In aid of this goal, section 1681m of the Act sets forth requirements for users of consumer reports, and provides that any person who takes adverse action based in whole or in part on information contained in a "consumer report"[4] shall provide three specific types of information to the consumer, in "oral, written, or electronic" form: (1) notice of the adverse action; (2) contact information for the consumer reporting agency (together with a statement that the agency did not make the decision to take the adverse action and cannot provide information concerning the action); and (3) notice of the consumer's right to obtain a copy of the consumer report and to dispute the accuracy or completeness of any information in the report.[5] 15 U.S.C. § 1681m.

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4. The Act broadly defines "consumer report" as any communication by a consumer reporting agency "bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used . . . as a factor in determining the consumer's eligibility for," among other things, "insurance . . . to be used primarily for personal, family, or household purposes[.]" 15 U.S.C. § 1681a(d)(1).

5. Section 1681m(a) provides:

> If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall–

(Cont'd)

In considering whether the adverse action notices at issue here met these requirements, the Ninth Circuit went well beyond the mandate of the statute. Rather, as noted above, the court concluded that a valid notice must, "at a minimum," specifically state that an adverse action was taken; "describe" the action; "specify the effect" of the action on the consumer; and identify the party or parties taking the action. *Reynolds*,

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(Cont'd)

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically–

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right–

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

435 F.3d 1095; *see id.* at 1100. None of these content requirements is found in section 1681m itself, and none can fairly be implied from the language of the statute.

In support of its holding, the Ninth Circuit cited only *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 150 (5th Cir. 1983), a case that has virtually nothing to do with the issues involved here. In that case, Fischl applied for credit to finance the bulk of the purchase price of an automobile. The credit application was referred to General Motors Acceptance Corp. ("GMAC"), which obtained a consumer report on Fischl. After reviewing the application and consumer report, GMAC determined that credit should not be extended. It then sent Fischl a form letter advising him that his application had been rejected on the ground that "credit references are insufficient." In the portion of the letter designed to disclose the use of information from outside sources, GMAC marked "disclosure inapplicable." *Id.* at 145. Fischl subsequently learned that GMAC had in fact obtained his credit information and filed suit under FCRA.

Not surprisingly, the Fifth Circuit held that GMAC's purported notice failed to comply with section 1681m, since it misleadingly stated "disclosure inapplicable" instead of informing Fischl that GMAC had in fact relied on a consumer report in denying Fischl's loan application. *Id.* at 150. But that is all the *Fischl* opinion says: Other than to make plain that an adverse action notice cannot contain untrue information, the case does not even address the required content of such a notice – much less hold that such a notice is invalid unless it contains the specific and detailed information required by the Ninth Circuit. Indeed, other than the Ninth Circuit here, no court in the country has ever interpreted section 1681m to impose any such requirements.

2. The Ninth Circuit's Interpretation of Section 1681m Conflicts with That of the Federal Trade Commission, the Agency Charged with Enforcing FCRA.

In accord with both the express statutory language and common sense, the Federal Trade Commission – the agency primarily responsible for enforcing the FCRA (*see* 15 U.S.C. § 1681s(a); *Fischl*, 708 F.2d at 149 n.4) – has specifically addressed what information an insurer must provide a consumer in an adverse action notice. In stark contrast to the Ninth Circuit's interpretation, both the FTC's regulations and its advisory materials essentially track the express language of the statute and state that, to be effective, an insurer's adverse action notice need only include "the name, address, and telephone number" of the agency supplying the report; "a statement that the credit reporting agency that supplied the report did not make the decision to take its adverse action"; and a notice of the consumer's right to dispute the information.[6] *See* 16 C.F.R. Part 601, App. C.; "FTC Facts

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6. In *Fischl*, the Fifth Circuit summarized the FTC's role in interpreting FCRA as follows:

> Although it does not possess substantive rule-making power, the FTC is authorized to enforce the FCRA, "except to the extent that enforcement . . . is specifically committed to some other government agency under [§ 1681s(b)]. . . ." §15 U.S.C. 1681s(a). . . . Due to the absence of express statutory authority to issue binding interpretations of the FCRA, which effectively deprives any such interpretation of the force of law, opinions disseminated by the FTC, whether in the form of its compliance manual or unofficial staff letters, are intended only to clarify the FCRA and are advisory in nature. *These opinions may nonetheless offer helpful guidance to the courts.*

708 F.2d at 149 n.4 (emphasis added).

for Business: Consumer Reports – What Insurers Need to Know" (FTC October 1998) (reproduced at PCI's Appendix ("PCI App.") at App. B); *see also* FTC Staff Opinion Letter, dated November 10, 1998, PCI App. at App. A (opining that section 615(a) of FCRA requires adverse action notices to contain "only the information specified" in the statute).

Prior to the decision below, no court had ever suggested, much less held, that an adverse action notice must contain the detailed content required by the Ninth Circuit. Nor can such a requirement be gleaned from a fair reading of the FCRA itself. To the contrary, the only source of specific information concerning the "official" interpretation of this aspect of FCRA – the FTC's regulations and the advisory materials written specifically for insurers – detail a much simpler and straightforward response to consumers in the event of adverse action. A writ of certiorari should therefore issue to review and correct the Ninth Circuit's unjustified and erroneous interpretation of section 1681m's notice requirements.

C. The Ninth Circuit's Notice Requirements Do Not Further FCRA's Purposes and Impose an Unreasonable Administrative and Economic Burden on Insurers.

As noted above, the primary goal of section 1681m is "to promote the accuracy of information in a consumer credit report." *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1334 (9th Cir. 1995). The Ninth Circuit's newly imposed "minimum" requirements are of no assistance whatever in achieving that end. To the contrary, and in contrast to the statutory requirements, the Ninth Circuit's requirements will serve only to impose an enormous operational burden on insurers without providing consumers with any additional information necessary to determine if their credit information is accurate and, if not, how to correct it. Take, for example, the Ninth Circuit's requirement that

the notice "specify the effect of the [adverse] action upon the consumer." *Reynolds*, 435 F.3d at 1095. First, this requirement is impermissibly vague in scope and application, since it is impossible to determine what the phrase "specify the effect" means or what level of detail is necessary to satisfy this criterion.[7] Moreover, assuming an insurer could overcome this threshold hurdle, the complexities of modern insurance underwriting are such that many insurers will simply be unable to provide the information apparently required by the Ninth Circuit – or at least to do so in a form that consumers will understand.

To be sure, some insurers may use credit information in such a straightforward way that the "effect" of the adverse action will be easy to discern and explain – such as when an insured's premium rate is increased solely and directly because of information in his or her credit report. More often, however, the role of consumer reports in the rating process is much more complicated and nuanced, having both direct and indirect ramifications. Insurance companies calculate premiums using various underwriting or rating factors. These factors can be affected in numerous ways by information contained in consumer reports. For example, many insurers use consumer report information to calculate an "insurance score," which is then used to place an applicant in a basic risk category or "tier," such as "preferred," "standard," or "nonstandard." Each of these tiers may have associated rating factors and may also, in turn, determine what other rating parameters are applied. Thus, for example, the fact of a speeding violation (information which itself comes from a consumer report) may affect the "preferred" risk tier differently than the "nonstandard" risk tier. Similarly, an applicant's insurance score may affect whether an applicant

7. Thus, far from providing guidance as to FCRA compliance, the Ninth Circuit's notice requirements threaten to open a Pandora's box of new litigation.

is eligible for certain discounts or surcharges and, if so, the amount of those discounts and surcharges.

This interaction among the various factors that go into the setting of premiums could make it literally impossible for an insurer to "specify the effect" of the "action" taken as a result of information derived from an individual policyholder's consumer reports. The problem is further complicated by the fact that insurers may use information from a number of consumer reports (e.g., credit reports, motor vehicle reports, and others) in setting a premium or determining eligibility for coverage, making any meaningful explanation of the "effect" of the reports virtually impossible. Suppose, for example, a policyholder has "good" credit (as derived from a credit report) and one speeding violation. Through sophisticated statistical techniques, an insurer might be able to derive the *overall* rate impact of these two factors combined, but not be able to separate the impact of the good credit, on the one hand, and the speeding violation, on the other. Just how is the carrier to "specify the effect" of its action in these circumstances?

The end result is that, to satisfy the Ninth Circuit's notice requirements, insurers may be forced to provide consumers with an extremely complicated description of their underwriting practices, corporate structure and business practices. Thus, far from providing clear, intelligible information designed to assist a consumer in determining whether his or her credit information is accurate and to correct it if it is not, the result of the Ninth Circuit's opinion is to impose upon insurers the duty to provide highly complex and detailed disclosures in which the key information contemplated by the statute will be all but lost.

D. The Ninth Circuit's Conclusions on Notice and Willfulness Are Inconsistent with FCRA's Intent and Threaten to Subject the Insurance Industry to Potentially Crippling Penalties.

Violations of FCRA (including the failure to comply with the adverse action notice requirements of section 1681m(a)) subject the users of consumer reports to a variety of civil damages and penalties. "Negligent noncompliance" subjects a user to liability for actual damages sustained by the consumer as a result of the noncompliance, plus court costs and attorney fees in the event of successful litigation. 15 U.S.C. § 1681o(a). If the noncompliance is "willful," the user is additionally liable for statutory damages of between $100 and $1,000 per consumer, as well as for punitive damages. *Id.* § 1681n(a).

As explained by the parties in their petitions, the Ninth Circuit's adoption of a "reckless disregard" standard of willfulness blurs the distinction between negligent and willful conduct and is therefore contrary to this Court's prior holdings.[8] Even were that not so clearly the case, other circuits have concluded – correctly – that the level of culpability required to constitute "willfulness" under FCRA is much higher, reserving its application to situations in which the defendant *knew* the challenged conduct to be unlawful. *See Phillips v. Grendahl*, 312 F.3d 357, 368, 370 (8th Cir. 2002) (noting that "the statute's use of the word 'willfully' imports the requirement that the defendant know his or her conduct is unlawful" and that "willful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law"); *Duncan*

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8. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 129-30 (1985), and *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988), both of which hold that mere negligence does not equal willfulness.

v. Handmaker, 149 F.3d 424, 429 (6th Cir. 1998) ("[I]n order to incur civil liability for operating under false pretenses, a party must act willfully and purposefully 'with a motivation to injure.' [Citation.] This interpretation comports with the language of § 1681n. . . ."). Indeed, the Ninth Circuit specifically acknowledged this split of authority, but opted to follow the "reckless disregard" standard adopted by the Third Circuit in *Cushman v. Trans Union Corp.*, 115 F.3d 220, 229 (3d Cir. 1997).[9] *Reynolds*, 435 F.3d at 1098. On the basis of this conflict alone, the Court should grant the petitions for certiorari.

Beyond this, however, the effect of the Ninth Circuit's erroneous interpretation of the term "willfully" itself warrants review by this Court. If the Ninth Circuit's "reckless disregard" standard were to be applied to all aspects of FCRA compliance, including the content of adverse action notices, major segments of the insurance industry could be subjected to potentially staggering statutory and punitive damages resulting from the routine – and long-approved – use of consumer reports. Given the significant numbers of adverse action notices sent each year, the potential financial penalties are staggering. The alternative is that insurers may be dissuaded from using consumer reports altogether, which would increase the cost of insurance to consumers.

These potential results are far removed from Congress's intent in enacting FCRA, which specifically authorizes the use of consumer reports in the underwriting of insurance. *See* 15 U.S.C. § 1681b. At the same time, the effect of the Ninth Circuit's notice requirements is to seriously disrupt the ability of insurers to do business and, in the final analysis,

9. Although declining to adopt an "actual knowledge" standard, the *Cushman* court was at least careful to point out that, to be actionable as a "willful" violation, the defendant's conduct "must be on the same order as willful concealments or misrepresentations." 115 F.3d at 227. The Ninth Circuit has not similarly qualified its holding.

to harm the very consumers that FCRA was enacted to protect. On this ground as well, this Court should grant the petitions for certiorari to review the Ninth Circuit's ill-considered opinion.

CONCLUSION

For all the reasons discussed above and in the parties' petitions, a writ of certiorari should issue to review the opinion and judgment of the Ninth Circuit below.

Respectfully submitted,

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APPENDIX

APPENDIX A — FTC STAFF OPINION LETTER, DATED NOVEMBER 10, 1998

Federal Trade Commission (F.T.C.)
Division of Financial Practices

Fair Credit Reporting Act

Staff Opinion Letter

November 10, 1998

Mr. Ronald L. Sheffield

Special Assistant Commissioner, Consumer Affairs

Arkansas Insurance Department

1200 West Third Street

Little Rock, AR 72201-1904

Dear Mr. Sheffield:

This will respond to your letter inquiring about the applicability of the Fair Credit Reporting Act ("FCRA") to an insurance company's denial of insurance to an applicant based on information contained in a consumer report. You ask two specific questions: (1) does the FCRA require an insurance company to disclose to an applicant what specific information in the credit report was relied on in denying insurance to that applicant; (2) if not, would the insurance company violate the FCRA by voluntarily disclosing such information to the applicant. The answer is "no" to both questions.

Section 615(a) of the FCRA sets forth the information that must be disclosed to a consumer by any person taking adverse

action[1] with respect to that consumer based in whole or in part on any information contained in a consumer report. That section requires disclosure of only the information specified, namely:

1. Notice (either oral, written, or electronic) of the adverse action;

2. The name, address, and telephone number of the consumer reporting agency ("CRA") from whom the report was obtained. If the CRA compiles and maintains files on consumers on a nationwide basis, the person must disclose a toll-free number for the CRA, which the CRA is required to establish;

3. A statement that the CRA did not make the decision to take the adverse action and is unable to provide the specific reasons why the action was taken; and

4. Notice of the consumer's right to obtain a free copy of his or her consumer report from the CRA and to dispute the accuracy or completeness of any information in a consumer report furnished by the CRA.

The FCRA does not require insurers to disclose specific reason(s) for taking adverse action, or to identify information from a consumer report that contributed to the action. Instead, it provides the consumer with the right to obtain a copy of all the information in his or her CRA files. From the required notice (item #4, above), consumers who suffer adverse action will know of their right to obtain that data without charge. However, should

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1. With respect to the underwriting of insurance, Section 603(k)(1)(B)(i) of the FCRA defines "adverse action" to mean "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

an insurer or other person wish to tell a consumer the reason(s) for the adverse action, nothing in the FCRA precludes that person from doing so.[2]

This is an informal staff opinion and is not binding on the Commission.

Sincerely,

Ronald G. Isaac

Attorney

2. Section 607(c) forbids CRAs from prohibiting insurers or other consumer report users from providing consumers against whom they have taken adverse action with copies of their reports.

APPENDIX B — "FTC FACTS FOR BUSINESS: CONSUMER REPORTS – WHAT INSURERS NEED TO KNOW" (FTC OCTOBER 1998)

As an insurer, you may use consumer reports to underwrite insurance policies and to screen high-risk applicants — as long as you comply with the Fair Credit Reporting Act (FCRA).

The Act

The FCRA is designed to protect the privacy of consumer report information and to guarantee that the information supplied by credit reporting agencies (CRAs) is as accurate as possible. Consumer reports may include information on an applicant's credit history, medical conditions, driving record, criminal activity, and hazardous sports. Amendments to the FCRA, which went into effect September 30, 1997, increase the legal obligations of insurers who use consumer reports.

5a

Appendix B

Non-compliance with the FCRA

There are legal consequences for insurers who fail to get an applicant's permission before requesting a consumer report or who fail to provide required disclosure notices. The FCRA allows individuals to sue insurers for damages in federal court. A person who successfully sues is entitled to recover court costs and reasonable legal fees. The law also allows individuals to seek punitive damages for deliberate violations. In addition, the Federal Trade Commission, other federal agencies, and the states may sue insurers for non-compliance and obtain civil penalties.

For More Information

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair business practices in the marketplace and to provide information to help consumers spot, stop, and avoid them. To file a complaint or to get free information on consumer issues, visit www.ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. The FTC enters Internet, telemarketing, identity theft, and other fraud-related complaints into Consumer Sentinel, a secure, online database available to hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.

Appendix B

The Adverse Action Notice

The following disclosure requirement applies to new applicants as well as current policy holders. When an adverse action is taken—such as a decision to deny insurance, increase rates, or terminate a policy—and it is based solely or partly on information in a consumer report, Section 615(a) of the FCRA requires you to provide a notice of the adverse action to the consumer. The notice must include:

- ✓ the name, address, and telephone number of the CRA that supplied the consumer report, including the toll-free telephone number for credit bureaus that maintain files nationwide;
- ✓ a statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give the specific reasons for it; and
- ✓ a notice of the individual's right to dispute the accuracy or completeness of any information the CRA furnished, and the consumer's right to a free report from the CRA upon request within 60 days.

Disclosure of this information is important because some consumer reports may contain errors. The adverse action notice is required even if information in the consumer report was not the main reason for the denial or rate increase. Even if the information in the report played only a small part in the overall decision, the applicant still must be notified.

While written adverse action notices are not required, many insurers provide them and keep copies for two years to show compliance with the FCRA.

Examples

The following examples illustrate situations where the adverse action notice must be given to insurance applicants.

A life insurance company orders a consumer report from a CRA, such as the Medical Information Bureau (MIB). Information contained in the MIB report leads to further investigation of the applicant. The application for insurance is rated or declined in whole or in part because of information obtained from the investigation.

Section 604(g) of the FCRA requires an insurance company, or any other user of medical information, to get the consumer's consent — orally, electronically, or in writing — before obtaining medical information. That means the life insurance company in this situation would have to get the consumer's consent before obtaining the consumer report from the MIB. In addition, since the MIB report formed part of the basis for the adverse decision in this case, the full Section 615(a) adverse action notice described above must be sent to the consumer.

A person with an unfavorable credit history, such as a bankruptcy, is denied automobile insurance at standard rates. Although the credit history was considered in the decision, the applicant's limited driving experience was even more important.

The applicant is entitled to the Section 615(a) adverse action notice because the credit report played a part, however minor, in the insurer's decision to charge a higher premium.